

**United States Department of Labor
Employees' Compensation Appeals Board**

E.J., Appellant

and

**U.S. POSTAL SERVICE, GEORGE W. YOUNG
POST OFFICE, Detroit, MI, Employer**

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**Docket No. 19-1909
Issued: August 19, 2020**

Appearances:

*Paul G. Johnson, for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 15, 2019 appellant, through her representative, filed a timely appeal from a January 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the January 16, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has abused its discretion in approving a fee in the amount of \$23,481.28 for services rendered by appellant's former counsel from January 27, 2009 to December 6, 2017.

FACTUAL HISTORY

On December 29, 2006 appellant, then a 34-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to the left side of her head when an automated postal center collapsed and struck her while in the performance of duty. OWCP accepted the claim for post-concussion syndrome and a scalp contusion, later expanding acceptance of the claim to include left shoulder sprain and impingement, cervical sprain, migraine headaches, a left shoulder superior labral tear from anterior to posterior (SLAP) lesion, and a facet injury at C3-4. It paid appellant wage-loss compensation on the supplemental rolls as of March 7, 2007 and on the periodic rolls as of February 17, 2008. She returned to work on September 1, 2008 as a modified clerk/call center agent with restrictions.

On January 22, 2009 appellant authorized her then-counsel Alan J. Shapiro, Esq. to represent her before OWCP. OWCP acknowledged receipt of that authorization on February 5, 2009.

Beginning September 1, 2009, appellant's work hours were reduced. OWCP again paid her wage-loss compensation on the supplemental rolls.

Appellant stopped work completely on March 17, 2010, as the employing establishment was unable to accommodate her work restrictions. OWCP continued to pay her compensation on the supplemental rolls and then placed her on the periodic rolls from April 11 through June 5, 2010. Appellant returned to work, but again stopped work on July 21, 2010 and underwent arthroscopic labral repair and subacromial decompression on the same date. She was released to full-time work with restrictions on November 22, 2010, but the employing establishment did not have work available within those restrictions, so she remained off work. OWCP paid appellant compensation on the periodic rolls for the period August 1, 2010 through December 17, 2011.

Appellant returned to work on December 18, 2011 and OWCP paid her intermittent wage-loss compensation on the supplemental rolls. She continued to file wage-loss compensation claims (Form CA-7) for intermittent periods of disability.

By decision dated January 18, 2013, OWCP denied appellant's wage-loss claims for the period August 16 through 24, 2012.

On January 22, 2013 appellant, through her then-counsel, requested a telephonic hearing before OWCP's Branch of Hearings and Review. Then-counsel represented appellant at the telephonic hearing which was held on May 16, 2013. Following the hearing, on June 28, 2013, he submitted medical evidence.

By decision dated August 5, 2013, an OWCP hearing representative affirmed the decision of January 18, 2013.

On September 6, 2013 appellant, through her then-counsel, requested reconsideration of OWCP's August 5, 2013 decision and submitted a brief in support of the reconsideration request.

OWCP paid appellant compensation on the periodic rolls from September 22, 2013 through October 17, 2015.

Appellant returned to full-time work with restrictions on November 2, 2015 as a customer care agent. Effective June 11, 2016, she began working as a full-time automated markup clerk.

On October 10, 2016 appellant filed a claim for a schedule award (Form CA-7).

Appellant continued to file CA-7 forms for intermittent disability from work.

By decision dated November 16, 2016, OWCP denied her claim for wage-loss compensation for the period May 31 through June 16, 2016.

On November 23, 2016 appellant, through her then-counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with regard to the November 16, 2016 decision.

By decision dated February 22, 2017, OWCP reduced appellant's monetary compensation based upon her actual earnings as an automated markup clerk with the employing establishment.

Appellant's then-counsel represented her at the telephonic hearing on June 8, 2017. Issues were discussed at the hearing in regards to both the November 16, 2016 and February 22, 2017 OWCP decisions.

On August 7, 2017 appellant filed a claim for a schedule award (Form CA-7).

By decision dated August 22, 2017, an OWCP hearing representative affirmed the November 16, 2016 and February 22, 2017 decisions.

By decision dated October 11, 2017, OWCP denied appellant's schedule award claim finding that she had not submitted sufficient medical evidence to support a finding of permanent impairment.

On October 18, 2017 appellant, through her then-counsel, requested a telephonic hearing before an OWCP hearing representative with regard to the decision of October 11, 2017.

On December 6, 2017 then-counsel requested a schedule award and enclosed a November 6, 2017 report of Dr. Peter Metropoulos, Board-certified in occupational medicine.

By decision dated January 19, 2018, OWCP's hearing representative conducted a preliminary review and determined that the case was not in posture for a hearing. The case was remanded for consideration of Dr. Metropoulos' November 6, 2017 report and referral of the case record to a district medical adviser.

By decision dated March 20, 2018, OWCP granted appellant a schedule award for 27 percent permanent impairment of the left upper extremity and 10 percent permanent impairment of the right upper extremity. The award was based, in significant part, on the reports from Dr. Metropoulos.

In a letter dated April 3, 2018, appellant advised OWCP that prior-counsel was no longer authorized to represent her.

That same day her prior-counsel submitted a fee petition in the amount of \$25,593.75 for services rendered from January 13, 2009 through December 6, 2017. The fee petition noted the hours spent as 78.75 hours and the hourly rate for counsel's services at \$325.00 per hour. The fee petition listed the specific services provided and the time spent on each activity. Many of the itemized services were for correspondence to OWCP and review of communications from OWCP. Her prior-counsel noted on a cover sheet that appellant had not signed and returned the fee petition with payment.

The fee petition was accompanied by a signed copy of the "Retainer Agreement" signed by appellant and prior counsel on January 22 and 29, 2009, respectively. The agreement included the following language in paragraph 6: "There is no fee or expense charged if no recovery is obtained. Simply said, no money, no fee or expense." Paragraph 7 noted that a fee petition would be furnished with a fee petition "when an award is obtained" and that any fees "are based on the time spent on your case."

OWCP sent appellant an April 5, 2018 letter, noting that her prior-counsel had submitted a request for authorization for payment of \$25,593.75 in attorney fees. Appellant was provided an opportunity to review the fee request and was informed that, if she did not respond within 30 days, it would be assumed she did not wish to comment. OWCP indicated it would then approve a fee which it determined to be fair and reasonable.

In a letter dated April 13, 2018, prior-counsel noted that his firm had offered appellant a reduced fee in the amount of \$18,000.00 payable over 25 months at the rate of \$720.00 per month, but that she was not interested in paying this reduced fee amount, and that as such, prior-counsel requested that the fee be set at \$25,593.75, which represented the full scope of work performed for appellant.

In a letter dated April 19, 2018, appellant asserted that she was opposed to the attorney fee request as the fee was set without her knowledge and consent, that she was unaware of the purported reduced fee, and the last time she corresponded with counsel was in 2013. She stated that her contract with her prior-counsel included a provision that no money would be owed if there was no recovery from the claim. Appellant noted that she had filed her own claim for a schedule award.

By letter dated May 16, 2018, prior-counsel reiterated that the fee request was for \$25,593.75, not \$18,000.00, as explained in his letter of April 13, 2018.

By decision dated June 4, 2018, OWCP approved the fee petition in the amount of \$23,481.25, out of the requested \$25,593.75, as reasonable, as counsel had represented appellant on a multitude of issues over a period of eight years. It noted that appellant's case was not in posture for a schedule award until after the issuance of OWCP's February 22, 2017 loss of wage-earning capacity decision, and that, subsequent to that decision, prior-counsel facilitated the issuance of the schedule award. OWCP advised that it had excluded fees for counsel's letters to OWCP and review of letters from OWCP on the following dates, as the correspondence had not been imaged into the electronic case record: November 15, 2014; April 27 and May 27, 2015; January 5, February 14, February 28, May 22 and December 28, 2016; January 20, May 2,

June 18, July 13 and August 9, 2017. It reduced fees for counsel's letters to OWCP and review of letters from OWCP on the following dates, finding that the requested fees were unreasonable: May 10, 2011; February 6 and August 29, 2013; June 14, 2014; February 28 and June 24, 2015; January 27, 2016; and December 6, 2017. The total reduction in charges in minutes was 390 minutes, accounting for a reduction of the requested fee amount by \$2,112.50 to \$23,481.25.

On June 25, 2018 appellant requested an oral hearing before OWCP's Branch of Hearings and Review.

OWCP received copy of a letter dated December 6, 2017, wherein prior-counsel enclosed a copy of an impairment rating physician's report, and informed appellant that her claim was now in posture for a schedule award. He explained to appellant that he had submitted a packet of information to OWCP requesting processing of the schedule award. He explained the process step-by-step and noted that he would follow up with appellant with status requests.

In a June 23, 2018 letter, appellant explained that she had filed the schedule award claim on May 29, 2012. She stated that she had retained her prior-counsel in order to recover lost wages and that he only participated in one hearing, following which her wage-loss claim remained denied. Appellant stated that counsel "disappeared" and she had not had any contact with him since 2013. She maintained that she was not aware that she was being billed for services by prior-counsel. Appellant stated that counsel directed her to Dr. Metropoulos, but she made the appointment with Dr. Metropoulos and OWCP paid for the visit. She reiterated that according to her retainer agreement, she did not owe counsel any fee because counsel's work had not resulted in a recovery of compensation.

OWCP also received an e-mail dated April 3, 2018, in which prior counsel noted the firm had obtained a schedule award for appellant by sending her to Dr. Metropoulos, and had represented her for years on many different issues without up-front payment. He stated that appellant certainly understood that he did not talk to her, look at her papers, appear at hearings, and direct her to Dr. Metropoulos for free, and that while she seemed to think she could have handled these matters without counsel, she had required assistance of counsel.

By decision dated September 12, 2018, OWCP's hearing representative conducted a preliminary review and found that the case was not in posture for a hearing. The hearing representative found that there was no evidence of record that OWCP had issued a letter to prior-counsel explaining the reasons for the proposed fee reduction and allowing him 30 days to submit evidence or argument against the reduction. OWCP's hearing representative further noted that there was no documentation of record indicating that appellant was advised of and agreed to the hourly rate of \$325.00, nor was there documentation of a signed agreement for a reduced charge of \$18,000.00. The hearing representative remanded the case to obtain a copy of the fee agreement for \$325.00 per hour and a copy of the agreement for a reduced charge of \$18,000.00, as well as providing prior-counsel with a notice of proposed fee reduction and allowing him 30 days to submit evidence or argument against the reduction.

In a letter dated September 25, 2018, OWCP requested that prior-counsel provide a copy of documentation indicating that appellant was advised of and agreed to his hourly rate of \$325.00, as well as a copy of the agreement between prior-counsel and appellant as to a reduced charge of \$18,000.00. It also requested that, if he disagreed with the proposed reduction in fees comprising

the June 4, 2018 decision, he should submit supporting evidence or argument within 30 days. No response was received.

By decision dated January 16, 2019, OWCP approved the fee petition in the amount of \$23,481.28 for services rendered from January 27, 2009 through March 26, 2017. The list of discrepancies and fee reductions due to the discrepancies was identical to the decision of June 4, 2018.

LEGAL PRECEDENT

It is not the Board's function to determine the fee for representative services performed before OWCP. That is a function within the discretion of OWCP based on the criteria set forth in Title 20 of the Code of Federal Regulations and mandated by Board decisions. The Board's sole function is to determine whether the action by OWCP constituted an abuse of discretion.⁴ Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁵

Section 10.703 of the Code of Federal Regulations provides in pertinent part that a representative must submit a fee application, which includes an itemized statement showing the hourly rate, number of hours worked, and the work performed.⁶ When a fee application has been disputed, OWCP is required to provide the claimant with a copy of the fee application and request the submission of further information in support of any objection.⁷ After the claimant has been afforded 15 days, from the date the request was forwarded, to respond to the request, OWCP will then proceed to review the fee application to determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (1) usefulness of the representative's services; (2) the nature and complexity of the claim; (3) the actual time spent on development and presentation of the claim; and (4) customary local charges for services for a representative of similar background and experience.⁸

It is well established that proceedings under FECA are not adversarial in nature.⁹ Once OWCP undertakes development of the record, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁰ It has an obligation to see that justice is done.¹¹

⁴ *C.H.*, Docket No. 17-0623 (issued June 27, 2017); *W.H.*, Docket No. 16-1297 (issued May 9, 2017); *L.H.*, Docket No. 11-0900 (issued December 6, 2011); *C.H.*, Docket No. 10-0987 (issued March 22, 2011); *Eric B. Petersen*, 57 ECAB 680 (2006); *Sharon Edwards*, 56 ECAB 749 (2005).

⁵ *Claudio Vazquez*, 52 ECAB 496 (2001).

⁶ 20 C.F.R. § 10.703(a)(1).

⁷ *Id.* at § 10.703(c).

⁸ *Id.*

⁹ *See N.L.*, Docket No. 19-1592 (issued March 12, 2020).

¹⁰ *See T.K.*, Docket No. 20-0150 (issued July 9, 2020).

¹¹ *Id.*; *see also supra* note 9.

ANALYSIS

The Board finds that the case is not in posture for decision.¹²

As discussed above, the Board does not determine the fee for representative services before OWCP. The Board reviews the issue to determine whether there was an abuse of discretion by OWCP. The Board has frequently held that it will not interfere with or set aside a determination by OWCP of a fee for legal services unless the determination is clearly in error.¹³ Herein, however, the Board is unable to render an informed decision on prior counsel's fee petition as additional information is necessitated.

In this regard, OWCP's hearing representative conducted a preliminary review and issued a decision on September 12, 2018 remanding the case to secure additional information on prior counsel's fee petition. On remand, the hearing representative requested that prior counsel submit a copy of the fee agreement for \$325.00 per hour to substantiate that appellant was aware of and agreed to the hourly fee. OWCP's hearing representative also requested a copy of the agreement for a reduced charge of \$18,000.00, noting that there was no evidence of record containing an agreement signed by appellant for the reduced charge. Although prior counsel did not respond within the 30-day time limit afforded him by the hearing representative, OWCP nonetheless approved a reduced fee of \$23,481.28 without the requested information. The Board finds that as OWCP undertook further factual development *via* the direction of its hearing representative, it had the responsibility to do so in a manner to resolve the issue of the contested fee petition. Since prior counsel did not comply with OWCP's request for additional information, the approved fee is set aside and the case is remanded to complete the further development.

The Board notes that section 10.702(a) of OWCP's regulations provides in pertinent part: "A representative may charge the claimant a fee and other costs associated with the representation before OWCP. The claimant is solely responsible for paying the fee and other charges.... Contingency fees are not allowed in any form."¹⁴

Paragraph 6 of the "Retainer Agreement" between appellant and prior counsel provided, "There is no fee or expense charged if no recovery is obtained. Simply said, no money, no fee or expense." Moreover, paragraph 7 provided in part that appellant would receive a fee petition "when an award is obtained." The Board notes that such language is indicative of a contingency agreement and therefore OWCP must further develop the record to determine if the fee arrangement is prohibited pursuant to section 10.702(a) of OWCP's regulations.¹⁵

Accordingly, the case is remanded to OWCP to secure the information requested by its hearing representative in the September 12, 2018 decision. Additionally, OWCP shall determine

¹² The Board notes that OWCP incorrectly identified the time span of counsel's rendered services as from January 27, 2009 through March 26, 2017 in its decision of January 16, 2019. The Board finds that this incorrect statement of the time span of counsel's rendered services constitutes harmless error, as OWCP analyzed counsel's fee request through December 6, 2017.

¹³ *R.P.*, Docket No. 18-0681 (issued November 1, 2018); *William Arthur Burney*, 29 ECAB 253 (1978).

¹⁴ 20 C.F.R. § 10.702(a).

¹⁵ *See id.*

whether prior counsel's "Retainer Agreement" is in the guise of a contingency fee agreement. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision on the fee petition.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 19, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board